

PFAS -- SO? What's the PROBLEM?

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Per- and Polyfluoroalkyl Substances (PFAS)

“Just another emerging contaminant?”

OR ANOTHER PCB OR ASBESTOS?

CDC: “One of the most seminal public health challenges for the next decades”

Clients have real problems, but there are multiple confounding uncertainties -- and multiple aspects of the landscape are still developing.

So..... what's the problem??



Problems! **HELP ME!**

1. I'm a victim – I have been exposed to PFAS on my land/in my water!
2. I'm a landowner – I have PFAS on my land! And maybe going off-site!
3. I'm a consultant -- I was helping my client deal with PFAS – now she's threatening a lawsuit!



1. I'm am an individual: PFAS in my blood maybe on my land and in my water!?

1. Is there a REAL risk? Is there harm?
 - It's in my blood! Detection vs. health threat?
 - An adverse health impact?
2. How did this happen?
 - Worker exposure?
 - What source(s)? On my land or in my water?
 - Where's the causal connection?
 - What can you prove?
3. What about my neighbor? Am I upgradient or downgradient?



I'm an individual

5. How can I solve my problem? (A health impact only? Or property impact, too?)

- Stop exposure – And do I own or rent?
- Is it private water or a public water system?
- Is insurance coverage available?
- What remedy will address the problem? Environmental monitoring? Money? medical monitoring?
- What legal causes of action are available?
 - Trespass, private nuisance, public nuisance?
 - RCRA imminent and substantial endangerment?
 - Use or disposal of an extra-hazardous substance, resulting in “strict liability?”
- Can I get the state/town interested in helping?

PROBLEM 2: I may have PFAS source on my land!

Arises in many contexts:

- My business used PFAS
- Former owner used PFAS
- Issue found in a Phase I/II Site Assessment for transaction
- Worker “walk-off” home exposure
- Drinking water testing
- Surface water or soil testing



I may have PFAS on my land!

What to do depends on the facts and the context.

1. What due diligence did you do before acquisition? Phase I?
What does the purchase & sale agreement say?
2. Do we have all the facts or do we need more investigation?
 - a. Retain expert under *Attorney Client Privilege* for legal advice
 - b. Begin investigation *In Anticipation of Litigation*
3. Property Access/Consent for sampling needed to other property?

I may have PFAS on my land!

3. Potential reporting to the state or neighbors
 - a. Required? Some laws are broad?
 - b. Even if not required, is it prudent or within the standard of care owed to another (duty to warn)?
4. Laying in the Weeds (Wait and See)
 - a. Advantages to doing nothing?
 - b. What if a current or impending health threat?
5. What are my legal rights against others?

3. I was helping my client, and now she's going to sue me!

For Example:

- Why didn't you consider PFAS when you advised me?
- Why didn't you recommend testing? Or, why didn't you test/test properly for this?
- Why isn't the remedy properly designed?
- You should have anticipated standards might change!



I was helping my client and now she's going to sue me!

What is the standard of care?

- Professional Standard of care – ordinarily used by others in the profession -- or a higher standard, e.g., Expert?
- In your state? Regionally? Nationally?

What does the contract say? Definitions and Limitations:

- Damages limitation
- Standard of care
- Dollar limitations on recovery
- Time limit on claims



I was helping my client and now she's going to sue me!

Notify your insurance carrier if a “claim” triggering coverage

What is the real impact on your business and you?

ASTM Phase I Standard – doesn't include PFAS if not a hazardous substance, consider adding it (or expressly excluding it)?

Consider a PFAS or “Emerging Contaminant” Addendum in your contracts

Just a FEW uncertainties in dealing with PFAS....

- Sampling/Analytical Challenges
- State regulatory actions coming, but what?
- No widely accepted “safe” level
- The science: toxicity reviews may change
- Proving causality can be difficult
- Engineering Issues: What level to hit, changing technology, O&M costs difficult to predict

Recent Legal developments

PFAS (PFOA and PFOS) just listed as Prop. 65 reproductive toxicants

First MCL proposed (NJ): 14 ppt PFOA and 13 ppt PFOS

NH Bill to set GW standards for pollutants contributing to groundwater contamination

Minn. \$5B Natural Resources Damage and Punitive Damages Claims

Coming:

PFAS health impact to be studied by CDC under Nat. Defense Authorization Act (but watch appropriations bill)

2018 ATSDR Toxicological Profile

How do you handle the extra uncertainty of PFAS when you have to deal with legal issues?

- A. Everything changes
- B. The future is uncertain
- C. It never turns out the way you expect

But seriously, find someone who is experienced, and work through the decision trees



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